Supreme Court of the United States

No. [illegible]

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. _____

ERNEST J. SAUBER,

Petitioner,

vs.

HOWARD B. GLIEDMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Ernest J. Sauber, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered November 10, 1960, opinion amended upon Petition for Rehearing by order entered December 12, 1960. The Court of Appeals affirmed the District Court in dismissing Sauber's claim for slander and libel against Howard B. Gliedman, a special assistant to the Attorney General on the ground that his press conference statements, as a matter of law, were absolutely privileged.

OPINION BELOW.

The opinion of the Court of Appeals and its order amending its opinion are set forth in Appendix A, *infra*, p. 13, and are reported at 283 F. 2d 941.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 10, 1960 (App. B, *infra*, p. 20). On December 12, 1960 the Court of Appeals amended its opinion, and denied petitioner's Petition for Rehearing (App. B, *infra*, p. 21). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTION PRESENTED.

Whether under the doctrine of *Barr* v. *Matteo*, 360 U. S. 564 (1959), absolute privilege attends the libel and slander of an accused by a special assistant to the Attorney General assigned to prosecute that accused, at a press conference call by the prosecutor.

STATEMENT.

(Numerals in parentheses refer to appendix pages.)

The defendant, Howard B. Gliedman, a resident of New York, was appointed a special assistant to the Attorney General of the United States and assigned specifically to conduct the prosecution of the plaintiff, Ernest J. Sauber, former District Director of Internal Revenue and others indicted on February 27, 1957 in Chicago, Illinois on charges of conspiracy to defraud the United States of income taxes due, and conspiracy to defraud and commit certain offenses against the United States, *U. S.* v. *Sullivan, et al.*, No. 57 CR 149 (4, 12-14, 19), presently pending in the Northern District of Illinois, Eastern Division. The defendant Gliedman had not conducted the grand jury investigation or obtained these indictments. He filed his letter of authority, which defined his duties, with the District Court Clerk on March 6, 1957 (Appended to this petition as Appendix C, *infra*, p. 22).

The next day, Gliedman called a press conference attended by reporters from the Chicago newspapers and wire services (5, 7). He stated that he was assigned to the inquiry because United States Attorney Robert Tieken had disqualified himself (9). He further stated that he would set up offices with his four aides and continue an investigation for 6 months (9). He stated that it was a sequel to the indictment of Sauber and four others in connection with the *Shotwell* case,[1] and would have two aims (9). He stated that he would conduct work preparatory to the Sauber trial to seek "possible further corruption" (5, 9). He further stated, "When you have a man who was district director indicted for conspiracy to defraud the U. S. government of money, it doesn't take a genius to see something is wrong" (5, 9). He further stated, "This is not a witch hunt, and it should be good for employee morale, because an awful cloud has been hanging over the Chicago office" (6, 8). He said that "if nothing is there, we won't put it there." These statements and others were published in the Chicago newspapers (6-10).

On March 14, 1957, Sauber commenced the claims at bar for slander and libel upon these statements uttered and published by Gliedman (4-11). The basis for federal jurisdiction is diversity of citizenship, which is admitted (4, 13). Gliedman filed a motion for summary judgment on the ground that his statements had been made in the line of duty and consequently were absolutely privileged as a matter of law. Attached to the motion was the affidavit of one Warren Olney, III, Assistant Attorney General of the United States, dated March 27, 1957, which briefly stated that "Howard B. Gliedman is in charge of the prosecution of the case of" *U. S.* v. *Sullivan, et al.*, "as well as in

1. *United States* v. *Shotwell Manufacturing Company*, 225 F. 2d 394 (C. A. 7th, 1955), remanded 355 U. S. 233 (1957), affirmed after hearing on remand, No. 12723, etc., C. A. 7th, February 8, 1961, not yet reported.

charge of the investigation of alleged irregularities in the office of the Director of Internal Revenue, Chicago, Illinois." Olney further stated that the defendant is performing "pursuant to authorization by the Attorney General", and that he "is authorized and expected to conduct relations with the press, and to make public statements as are called for in connection with his assignment." (19).

On September 24, 1957, the district court, per Hoffman, J., denied summary judgment on the ground that Gliedman's statements were not privileged (27-36). In the course of his opinion, Judge Hoffman found that the duties of defendant, Gliedman,

> "* * * are in effect, those of a prosecuting attorney, and do not require for their efficient performance that he be permitted to make public explanations of his official acts, with immunity from civil actions for malicious defamation based thereupon." (34.)

The court took judicial notice of the Attorney General's letter of authorization on file with the clerk (32) (App. C, *infra*, 22). The letter authorized Gliedman to assist in the trial of certain cases, to file informations, and to conduct any legal proceedings, civil or criminal, including grand jury proceedings, which district attorneys are authorized by law to conduct.

Thereafter, defendant Gliedman filed a motion to dismiss on the ground that his statements were not libel and slander *per se* (36, 37). The district court, per Hoffman, J., found libel and slander *per se*, and denied the motion, except as to one allegation in the Second Claim (37). This is the law of the case as to the libel and slander alleged in the complaint.

On July 27, 1959, defendant filed a renewed motion for summary judgment on the ground of absolute privilege upon the authority of *Barr* v. *Matteo*, 360 U. S. 564, then

recently decided by this court. There was no change in the factual matter as submitted to Judge Hoffman two years before. Judge Edwin A. Robson, to whom the matter had been reassigned, dismissed the cause on the authority of *Barr*, finding absolute privilege upon "a sufficient relationship between the statements made by defendant to the press and the matters under his supervision" (41, 42).

Plaintiff appealed. On November 10, 1960, the court below affirmed, stating that, by the criteria set forth in *Barr*, Gliedman's statements to the press called for the application of the doctrine of absolute privilege. In addition to Gliedman's letter of authorization (App. C, *infra*, 22) and the Olney affidavit (19), the court below took judicial notice of a Memorandum concerning privilege issued by Attorney General Rogers subsequent to the decision in *Barr* (the Memorandum is attached hereto as Appendix D, *infra*, 25). On Petition for Rehearing, the court below amended its opinion in minor respects (App. A, *infra*, 19).

Reasons for Granting the Writ.

The court below concluded that Gliedman's statements to the press were absolutely privileged, citing the recent case of *Barr* v. *Matteo*, 360 U. S. 564 (1959). It found that Gliedman was expected to make public statements, and the defamations complained of here related to the subject matter of his assignment as a prosecutor and were "of public interest and concern." It further stated that if any impropriety committed by the prosecuting attorney interfered with a fair trial, it must be remedied in the criminal proceeding against the defamed accused, or the prosecuting attorney could be otherwise subject to discipline and professional censure. It concluded that these sanctions alone must serve to inhibit unprofessional activi-

ties and undue injury to private individuals, even though the defamed individuals "have been denied their private remedy in the great interest of the public in the effective functioning of government."

The court below grants absolute immunity to a government prosecutor who has ostensible permission to issue press releases, so long as the subject matter of his press conference relates in some manner to the subject matter of his realm of employment. The privilege extends to any public statement he may choose to make, including the license to directly defame and to comment upon the guilt of the accused he is assigned to prosecute.

1. It is submitted that the decision of the court below does not accord with the decision of this Court in *Barr*. So far as counsel can determine, this is the first petition asking this Court to explore the outer perimeter of absolute privilege defined in the separate opinions in *Barr*. We believe that the decision here is directly contrary to the limits therein set forth. In that case, the Acting Director of Rent Stabilization, the actual head of the agency, publically stated the agency's official position on terminal-leave pay. He intended to answer strong Congressional disapproval of a prior unauthorized statement conceived and issued over his signature by those libelled. The suspension of the employees responsible was stated in the press release.

Mr. Justice Harlan, joined by Justices Frankfurter, Clark and Whittaker, actually upheld an absolute privilege upon the specific circumstances of the case, at 574-575:

> "The *question is a close one*, but we cannot say that it was not an appropriate exercise of the discretion with which an *executive officer of petitioner's rank* is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this

record. Petitioner was the *Acting Director of an important agency* of government, and was *clothed* by redelegation with 'all powers, duties, and functions conferred on the President by Title II of the Housing and Rent Act of 1947 * * *.' The integrity of the internal operations of the agency which he headed, and thus his own integrity in his public capacity, had been *directly and severely challenged* in charges made on the floor of the Senate and given wide publicity; and without his knowledge correspondence, which could reasonably be read as impliedly defending a position very different from that which he had from the beginning taken in the matter had been sent to a Senator over his signature and incorporated in the Congressional Record. The issuance of press releases was *standard agency practice*, as it has become with many governmental agencies in these times. We think that under these circumstances a *publicly expressed statement of the position of the agency head*, announcing personnel action which he planned to take in reference to the charges so widely disseminated to the public, was an appropriate exercise of the *discretion which an officer of that rank* must possess if the public service is to function effectively. It would be an unduly restrictive view of the scope of the duties of a *policy-making executive official* to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty." (Emphasis supplied.)

It is submitted that the particular circumstances of *Barr* are not present here. The prosecutor Gliedman at bar was not of high executive rank, nor had his views or integrity or those of the Department of Justice been misrepresented or impugned before Congress or anywhere else. He was not explaining a department regulation or policy. He was not engaged in performing the actual duties of his office.[2]

2. Gliedman's letter of authority specifically stated the limits of his duties. App. B, *supra*, p. 22. *United States* v. *Rosenthal*, 121 F. 862, 867 (C. C. S. D. N. Y. 1903); *United States* v. *Cohen*, 273 F. 620, 621, (D. Mass., 1921); *United States* v. *Huston*, 28 F. 2d 451, 456 (N. D. Ohio, 1928).

The gratuitous defamatory public statements here are not a necessary corollary to the office of prosecutor.

In concurring in *Barr*, Mr. Justice Black emphasized the duty of Mr. Barr to criticize the way his Agency or its employees perform their duties, stating at 577-578:

> "As far as I am concerned, if federal employees are to be subjected to such restraints in reporting their views about how to run the government better, the restraint will have to be imposed expressly by Congress and not by the general libel laws of the States or of the District of Columbia. How far the Congress itself could go in barring federal officials and employees from discussing public matters consistently with the First Amendment is a question we need not reach in this case. It is enough for me here that the press release was neither unauthorized nor plainly beyond the scope of Mr. Barr's official business, but instead related more or less to general matters committed by law to his control and supervision."

However, at bar, the prosecutor Gliedman was not reporting his views about how to run the government better, or criticizing the way a fellow public employee was doing his job.[3] He was not simply explaining a public record. But assuming this to be his purpose, can it encompass the prosecutor's extra-judicial and irrelevant defamation of the accused he is to prosecute? Public interest in an explanation by a government prosecutor of his activities should not give the prosecutor an absolute privilege, an open invitation, to libel the accused he is to prosecute by broadcasting the prosecutor's belief in his guilt to the general public.

In his dissent in *Barr*, Mr. Chief Justice Warren, joined by Justice Douglas, questioned the at best uncertain standards used by the majority, at 586:

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3. Sauber was no longer employed by the government at the time.

> "Rather, its result has been an uncertain standard whose effect can unfold only on a case-to-case basis, and which does not provide a guide for executive conduct. But more important, the opinion has set out the wrong interests and by its extension of absolute privilege in this case has seriously weakened another great public interest—honest and open discussion and criticism of our Government."

The interests found paramount by the majority and the need for public discussion of the conduct of our officials emphasized by Chief Justice Warren, are not even present at bar. Sauber, the accused, stands as a private citizen, defamed with impunity because his prosecutor had a right to inform the public of his "important" activities as an agent of the sovereign.

In a separate dissent in *Barr*, Mr. Justice Brennan points out that the Supreme Court wrote "on almost a clean slate," since only *Spalding* v. *Vilas*, 161 U. S. 483, had previously brought the question of privilege before the court; he further warns that the dangers "solved" by upholding a broad immunity for every official having some color of discretion to utter communication to the public are ephemeral, at 590:

> "To what extent does fear of litigation actually inhibit the conduct of officers in carrying out the public business? To what extent should it? Where does healthy administrative frankness and boldness shade into bureaucratic tyranny? To what extent is supervision by an administrator's superiors effective in assuring that there will be little abuse of a freedom from suit? To what extent can the referral of constituent complaints by Congressmen to the executive agencies (already myriad in number and quite routinized in processing) take the place of actions in the courts of law in securing the injured citizen redress? Can it be assumed, as the opinion appears to assume, that an absolute privilege so broadly enjoyed will not be subject to severe abuse?"

Just the severe abuse envisioned by Mr. Justice Brennan is condoned at bar. The traditional role and duties of the prosecutor are ignored.[4] Instead, the trial attorney for the sovereign may comment upon any facet of the affairs of his office with impunity. It is submitted that this is an unwarranted extension of *Barr*.

2. We are not here concerned with the prosecutor's unfettered judgment and his fearless prosecution of crime, as the court below intimates. The gratuitous public defamation at bar is not a defamatory tactic of the prosecutor in the course of a judicial proceeding, nor is the claim at bar in recrimination for a malicious act performed directly in the line of duty, such as in bringing a criminal indictment.[5] Indeed, in those circumstances, Sauber as a defendant could protect himself by refuting the charges upon trial.

But, at bar, the defamation is extra-judicial. The fortuitous circumstance that the prosecutor is a federal employee should not enlarge his rights to the detriment of the accused and, indeed, to the detriment of the judicial system itself. The court below summarily rejected *Jacobs* v. *Herlands*, 17 N. Y. S. 2d 711, 712, aff'd 19 N. Y. S. 2d 770 (1940), as only "applicable to the activities of a prosecuting attorney under New York law." This is the only reported case found by counsel which involved defamation by a prosecuting attorney at a press conference. Therein, the court struck the defense of privilege, stating at 712-713:

"The libel complained of herein was no part of the

4. Rule 6(e), Federal Rules of Criminal Procedure; Canon 5 and Canon 20, A. B. A. Canons of Professional Ethics; *Berger* v. *United States*, 295 U. S. 78, 88 (1934); *United States* v. *Mathues*, 27 F. 2d 137 (E. D. Pa., 1928).

5. *Cf. e.g. Yaselli* v. *Goff*, 12 F. 2d 396, 404 (C. A. 2nd, 1926) affd. 275 U. S. 503; *Laughlin* v. *Rosenman*, 163 F. 2d 838, 841 (D. C. Cir., 1947); *Hartline* v. *Clary*, 141 F. Supp. 151, 158 (E. D. S. C. 1956); Anno. 56 A. L. R. 1255 (1928).

judicial proceeding, if it be assumed that the investigation was a judicial proceeding. The summoning of reporters and the *giving out of a statement* to them containing the alleged libel *was something entirely outside of the acts* of the defendant in making the investigation.

"*No prosecuting officer* or investigator *is justified* in anticipation of finding evidence of wrongdoing, *in making a public statement to the press, which injures the reputation of any person.* With due regard for the right of the public to be informed of the conduct of its officials, the time for such information to be given is after evidence of wrongdoing has been obtained. The *rights of the individual*, as well as the rights of the public, *are to be considered.*" (Emphasis supplied.)

In the federal realm here, as in New York, the fair administration of criminal justice is not only prosecutor Gliedman's responsibility, but that of the Court as well.[6] The Department of Justice has recognized this responsibility, ignored by the court below, in the very departmental memorandum cited below. Attorney General William P. Rogers, in analyzing *Barr* for the guidance of his subordinates, denies immunity:

"As to the extent and limitation of the privilege, although referred to as an 'absolute privilege,' *it applies only to statements made in the course of the exercise of the duties of the office. The privilege does not apply to defamatory statements unrelated to official duties.* Furthermore, there may be a close question as to whether a statement is in the line of duty of the office within the meaning of the decisions (See dissent by Justice Stewart in the *Barr* case). Thus, no government official should assume that these decisions give him full and complete protection against actions for defamation. Accordingly, should it become neces-

6. *Cf. Murray* v. *Brancata*, 290 N. Y. 52, 57; 48 N. E. 2d 257 (1943); *Francis* v. *Branson*, 168 Okla. 24, 29; 31 P. 2d 870 (1934); Anno. 146 A. L. R. 913 (1943).

sary for an official to issue a statement of a derogatory nature, care should be taken that the statement clearly *pertains to the duties of the office* and the official involved should himself be satisfied that he has the authority to issue it." (Emphasis added.) (App. D, *infra*, 26.)

Unprofessional extra-judicial defamation while acting as a prosecutor should not be privileged from civil responsibility. It is submitted that *Barr* is not authority for such an immunity.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 13002 SEPTEMBER TERM AND SESSION, 1960.

ERNEST J. SAUBER,
Plaintiff-Appellant.
vs.
HOWARD B. GLIEDMAN,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 10, 1960.

Before HASTINGS, *Chief Judge*; CASTLE, *Circuit Judge*; and GRUBB, *District Judge*.

GRUBB, *District Judge*. This is an appeal from an order granting summary judgment for the defendant and dismissal of the cause in an action for malicious defamation.

Defendant-appellee, Howard B. Gliedman, was appointed a Special Assistant to the Attorney General of the United States for the purpose of the prosecution of plaintiff-appellant, Ernest J. Sauber, former District Director of Internal Revenue in Chicago, Illinois, who, together with four other individuals, had been indicted on charges of conspiracy to defraud the United States of income taxes due and to commit certain other offenses, which charges grew out of certain pending criminal tax evasion cases.

Under his letter of authority which was filed with the district clerk on March 6, 1957, Gliedman was assigned:

> "* * * to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested; and in that connection you are specifically directed to file informations and to conduct in the Northern District of Illinois and in any other judicial district * * * any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates which district attorneys are authorized by law to conduct."

The transactions referred to in this letter related to possible further irregularities in the Chicago office of the Internal Revenue Service.

Gliedman took his oath of office on March 6, 1957. On the following day he held a press conference in which he explained the reasons for his appointment as well as its purpose and scope. The following statements allegedly made during this press conference constitute the claimed malicious defamation:

> "To conduct work preparatory to the Sauber trial to seek 'possible further corruption.'
>
> "'When you have a man who was district director indicted for conspiracy to defraud the U. S. government of money, it doesn't take a genius to see something is wrong.'
>
> "'This is not a witch hunt, and it should be good for employee morale, because an awful cloud has been hanging over the Chicago office.'
>
> "'If nothing is there, we won't put it there'."

The second claim of the complaint alleging that the defendant requested and procured two newspapers to publish false and defamatory matter concerning Sauber was dismissed by the district court and is not in issue here.

Gliedman filed a first motion for summary judgment on

the ground of absolute privilege, which motion was supported by an affidavit of Warren Olney III, Assistant Attorney General of the United States, and which states in part as follows:

> "Howard B. Gliedman is in charge of the prosecution of the case of *United States* v. *Harold E. Sullivan, Byron A. Cain, Leon J. Busby, Ernest J. Sauber, and Ralph R. Johnson*, as well as in charge of the investigation of alleged irregularities in the office of the Director of Internal Revenue, Chicago, Illinois.
>
> "Howard B. Gliedman entered upon the above assignment on March 5, 1957, and he is performing this function in the capacity of Special Assistant to the Attorney General of the United States pursuant to authorization by the Attorney General of the United States.
>
> "In his capacity as Special Assistant to the Attorney General of the United States, Howard B. Gliedman is authorized and expected to conduct relations with the press, and to make such public statements as are called for in connection with his assignment."

This motion was denied. Relying on the cases of *Barr* v. *Matteo*, 244 F. 2d 767 (D. C. 1957), and *Colpoys* v. *Gates*, 118 F. 2d 16 (D. C. 1941), Judge Hoffman concluded that statements to the press relating to explanations of official acts or policies were attended by absolute privilege only where made by cabinet members or officers of comparable rank, and that Gliedman's duties as prosecuting attorney did not require the application of the protection of the doctrine of absolute privilege in respect to his communications to the press.

After reversal of the appellate decision in the *Barr* case by the Supreme Court in *Barr* v. *Matteo*, 360 U. S. 564 (1959), Gliedman renewed his motion for summary judgment based on the well pleaded allegations of fact of the complaint and on the Olney affidavit submitted for the purposes of the first motion for summary judgment.

Judge Robson, to whom the case had been reassigned, held that the *Barr* case controlled this action and granted the motion for summary judgment. It is this order which is being reviewed.

Upon consideration of the circumstances under which these statements were made as set forth in the complaint it is the conclusion of this court that Gliedman's statements to the press were absolutely privileged and that the absolute privilege attending the communications serves as a bar to any civil action for libel or slander based on said defamatory statements.

In the *Barr* case, the Supreme Court had before it a press release by an acting director of an executive agency, the Office of Rent Stabilization. The press release related to internal agency affairs which had received congressional notice which in turn had become the subject of press comment. The communication did not concern the official functions of the agency as such. In delineating the scope of absolute privilege attending the acts of federal governmental officials, the court set forth criteria by which the challenged acts must be judged in order to determine the applicability of the doctrine.

Under the rule of the *Barr* case, privilege is not an attribute of a particular title or rank of office. The test of privilege is the relation of the conduct complained of to matters committed to the official's control and supervision. A public statement may be privileged where the nature of the official's duties requires that he be immune from private tort liability in respect to it in furtherance of the effective functioning of government. Privilege, therefore, is directly dependent upon the scope of power and discretion incident to the duty entrusted to the officer by delegation and redelegation of authority from the highest to the lower levels of the governmental hierarchy.

In *Barr*, the Supreme Court further noted that the offi-

cial was the acting head of an important agency clothed with powers of the executive by redelegation; that the subject matter of the press release had had wide publicity; and that the issuance of the release was standard agency practice. It held that the challenged action was within the "outer perimeter" of the official's duties and was thereby brought within the protection of privilege.

Measured by the criteria set forth in the *Barr* decision, Gliedman's statements to the press call for the application of the doctrine of absolute privilege. As Special Assistant to the Attorney General, Gliedman's powers were equivalent to those of a United States attorney. Title 5 U. S. C. A., Section 310, Conduct of legal proceedings. In respect to his legal assignment of prosecutor and investigator of Sauber and the Department of Internal Revenue in Chicago, Gliedman was the direct representative of the Attorney General of the United States. As such representative by assignment, Gliedman held the responsibilities, duties, and discretion of the Attorney General of the United States, limited in scope only to the proceedings assigned to him.

His superior officer certified that Gliedman was authorized and expected to conduct relations with the press and to make such public statements as were called for in connection with his assignment. The statement to the press complained of here related to the subject matter of Gliedman's assignment. Irregularities in the performance of their duties by important public officials are of great public concern, and the public has a right to be informed as to the steps taken by the proper governmental agency to investigate and correct abuses of authority.

Liability to respond in damages in an action based on defamatory statements to the press relating to matters within his power and discretion and of public interest and concern might seriously interfere with the performance

of the duties of a Special Assistant to the Attorney General of the United States. *Cf. Spalding* v. *Vilas*, 161 U. S. 483 (1896); *Barr* v. *Matteo*, 360 U. S. 564 (1959); *Gregoire* v. *Biddle*, 177 F. 2d 579 (1949).

It is settled that the issue of privilege of federal officials in respect to activities in the course of their duties is governed by federal law. *Howard* v. *Lyons*, 360 U. S. 593, 597. The case of *Jacobs* v. *Herlands*, 17 N. Y. S. 2d 711 (1940), relied on by appellant, is, therefore, inapplicable since it determined the question of privilege as applicable to the activities of a prosecuting attorney under New York law.

Any impropriety committed by a prosecuting attorney that interferes with an accused's constitutional right to a fair and impartial trial may be remedied in the criminal proceeding against the accused. *Cf. United States* v. *Stromberg*, 268 F. 2d 256, 269-270 (2d Cir. 1959), cert. den. 361 U. S. 863. Although the official may be immune to civil tort liability, he may nevertheless be subject to discipline and professional censure where warranted. *Gregoire* v. *Biddle*, *supra*, at 581; *Barr* v. *Matteo*, *supra*, at 576.

The "Memorandum to the Heads of All Departments and Agencies" issued by Attorney General William P. Rogers immediately after the publication of the Supreme Court's decision in *Barr* v. *Matteo* notes that the reference to sanctions in the *Barr* case "undoubtedly includes disciplinary action or removal from office if official irresponsibility should be involved." These sanctions serve to inhibit unprofessional activities and undue injury to private individuals, although the individuals directly affected may have been denied their private remedy in the greater interest of the public in the effective functioning of the government.

For the foregoing reasons, the order of the district court must be and is hereby AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 13002. SEPTEMBER TERM AND SESSION, 1960.

ERNEST J. SAUBER,
Plaintiff-Appellant;
vs.
HOWARD B. GLIEDMAN,
Defnedant-Appellee.

On Petition for Rehearing.

December 12, 1960.

Before HASTINGS, *Chief Judge;* CASTLE, *Circuit Judge;* and GRUBB, *District Judge.*

GRUBB, *District Judge.* In order to correct certain erroneous statements of fact in the opinion in the above-entitled case which were pointed out by appellant in his brief on a petition for rehearing, the opinion is hereby amended by deleting therefrom the second last paragraph on page 2 beginning with the words, "The second claim of the complaint * * *," and by further deleting therefrom the words, "and its supporting affidavit," following the words, "the complaint," found in the last line on page 3.

The statements hereby corrected are not material to the decision. Other contentions on the petition for rehearing are without merit, and the petition is, therefore, hereby DENIED.

APPENDIX B.

UNITED STATES COURT OF APPEALS,
for the Seventh Circuit.

Chicago 10, Illinois.

Thursday, November 10, 1960.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Kenneth P. Grubb, District Judge.

ERNEST J. SAUBER, *Plaintiff-Appellant.* vs. HOWARD B. GLIEDMAN, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13002

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS,
for the Seventh Circuit.

Chicago 10, Illinois.

Monday, December 12, 1960.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Kenneth P. Grubb, District Judge.

ERNEST J. SAUBER,
Plaintiff-Appellant.

No. 13002 *vs.*

HOWARD B. GLIEDMAN,
Defendant-Appellee.

On Petition for Rehearing.

IT IS HEREBY ORDERED that the opinion of this Court heretofore filed on November 10, 1960, be amended in accordance with the opinion on Petition for Rehearing filed this day.

IT IS FURTHER ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C.

UNITED STATES DEPARTMENT OF JUSTICE.
Washington, D. C.

March 5, 1957

WO:ZCB:mes
Mr. Howard B. Gliedman
Criminal Division
Department of Justice
Washington, D. C.

FILED
MAR 6-1957
ROY H. JOHNSON
CLERK

DEAR MR. GLIEDMAN:

As an attorney and counselor at law you are hereby specially retained and appointed as a Special Assistant to the Attorney General, under the authority of the Department of Justice, to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested; and in that connection you are specifically directed to file informations and to conduct in the Northern District of Illinois and in any other judicial district where the jurisdiction thereof lies, any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates which district attorneys are authorized by law to conduct.

The Department is informed that various persons, companies, corporations, organizations and firms to the Department unknown have violated in the Northern District of Illinois and in other districts the Internal Revenue laws (26 U. S. C.) and Sections 201, 202, 1001, 1505, 1621 and 371 of Title 18 of the United States Code by promising, offer-

ing and giving money and things of value to officers or employees or persons acting for or on behalf of the United States with intent to influence them to commit or aid in committing or to collude in fraud or make opportunity for the commission of fraud on the United States; by accepting or receiving money or gratuities while acting for or on behalf of the United States in an official capacity with intent to have their decision or action on matters pending before them in their official capacity influenced thereby; by making false, fictitious, or fraudulent statements in matters within the jurisdiction of a Department or agency of the United States; by obstructing justice; by committing perjury; and by conspiring so to do and to defraud the United States and have violated other criminal laws of the United States and have conspired to commit all such offenses in violation of Section 371 of Title 18 of the United States Code.

You will receive no compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division, Department of Justice.

Respectfully,

By direction of the Attorney General
WILLIAM P. ROGERS.
Deputy Attorney General.

Form No. DJ-16
(Ed. 5-24-55)

FILED
MAR 6-1957
ROY H. JOHNSON
CLERK

OATH OF OFFICE.

I, Howard B. Gliedman, do solemly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of Special Assistant to the Attorney General, under letter of appointment dated March 5, 1957, authorizing me to assist in presentation to the grand jury and trial, in the Northern District of Illinois of the cases in which the Department is informed that various persons, companies, corporations, organizations and firms to the Department unknown have violated in the Northern District of Illinois and in other districts the Internal Revenue laws (26 U. S. C.) and Sections 201, 202, 1001, 1505, 1621 and 371 of Title 18 of the United States Code by promising, offering and giving money and things of value to officers or employees or persons acting for or on behalf of the United States with intent to influence them to commit or aid in committing or to collude in fraud or make opportunity for the commission of fraud on the United States; by accepting or receiving money or gratuities while acting for or on behalf of the United States in an official capacity, etc., as set forth in letter of appointment dated March 5, 1957 on which I am about to enter: So help me God.

(Sign here) HOWARD B. GLIEDMAN.

Subscribed and sworn to before me this 6th day of March A.D., 1957.

JAMES F. KUCHTA.
Deputy Clerk.

Date of Birth June 21, 1913.

Date of entry upon duty March 6, 1957.

APPENDIX D.

DEPARTMENT OF JUSTICE.

For Release in A.M. Papers

Monday, July 13, 1959.

The Department of Justice made public today the attached memorandum which Attorney General William P. Rogers is sending to the heads of all Departments and Agencies of the Executive Branch of the Government, suggesting that it be disseminated to the appropriate officials in their respective departments and agencies.

MEMORANDUM TO THE HEADS OF ALL DEPARTMENTS AND AGENCIES.

The Supreme Court, on June 29, 1959, held that executive officers of the federal government have an "absolute privilege" for defamatory statements issued in the course of their official duties. (*Barr* v. *Matteo* and *Howard* v. *Lyons*). Thus, it confirmed a contention advanced by the Department of Justice that officials in the Executive Branch of Government may not be held liable for damages for defamation as a result of statements made in the exercise of the duties of their offices.

The purpose of this memorandum is (1) to point out the extent and limitations of the privilege, and (2) to set forth the principles which should guide officials in the Executive Branch in the exercise of the privilege.

These decisions constitute a Supreme Court affirmation of a privilege that has long existed for many government officials. Any statement made in either House is privileged

for the Constitution provides expressly that members of Congress "shall not be questioned in any other place." By Supreme Court decisions, this privilege was held applicable to the Judicial Branch of government in 1871 and cabinet officers in 1896. Since that time, the lower federal courts (with minor exceptions) have held that this privilege is not confined to cabinet officers, but extends to other executive officials performing important policy functions. In its decisions in *Barr* and *Howard*, the Court confirmed these precedents, ruling that it is not the title but the duties of the office which clothes the official with immunity from civil defamation suits.

The reason for recognizing this privilege was well stated by Mr. Justice Harlan: "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."

1.

As to the extent and limitations of the privilege, although referred to as an "absolute privilege", it applies *only* to statements made in the course of the exercise of the duties of the office. The privilege does not apply to defamatory statements unrelated to official duties. Furthermore, there may be a close question as to whether a statement is in the line of duty of the office within the meaning of the decisions. (See dissent by Justice Stewart in the *Barr* case.) Thus, no government official should assume that these decisions give him full and complete protection against actions for defamation. Accordingly, should it become necessary for an

official to issue a statement of a derogatory nature, care should be taken that the statement clearly pertains to the duties of the office and the official involved should himself be satisfied that he has the authority to issue it.

2.

Notwithstanding the existence of this privilege, officials of the Executive Branch of the federal government should act with an awareness of the vital importance of avoiding unnecessary injury to any person. An official who in the course of his official duties contemplates making a statement which might be deemed to be derogatory should be keenly aware of the heavy responsibility which falls on him. For as Justice Harlan said, "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." The privilege imposes therefore on all public officials a duty to act with care and restraint for what may be at stake is the reputation of a person without legal recourse.

Furthermore, as the opinion points out "there are of course other sanctions than civil tort action available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner." Although it is fully expected that the privilege will be exercised with care and thoughful restraint (the Court points out that past experience indicates it will be) the reference to other sanctions undoubtedly includes disciplinary action or removal from office if official irresponsibility should be involved.

FILE COPY

No. 803

JAMES R. BROWNING

In the Supreme Court of the United States

OCTOBER TERM, 1960

ERNEST J. SAUBER, PETITIONER

v.

HOWARD B. GLIEDMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

WILLIAM H. ORRICK, JR.,
Assistant Attorney General,

ALAN S. ROSENTHAL,
KATHRYN H. BALDWIN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (App. 40-42)[1] is not reported. The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. A, pp. 13-18) and the opinion on motion for rehearing, amending the opinion and denying the motion for rehearing (Pet. App. A, p. 19), are reported at 283 F. 2d 941.

---

[1] "App." refers to the "Appendix for Plaintiff Appellant" in the court of appeals, now on file in this Court.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1960 (Pet. App. B, p. 20). The order of the court of appeals denying the petition for rehearing was entered on December 12, 1960 (Pet. App. B, p. 21). The petition for a writ of certiorari was filed on March 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the public statements made by respondent, a Special Assistant to the Attorney General of the United States, were absolutely privileged.

STATEMENT

Petitioner commenced this action for slander and libel to recover for allegedly false, malicious and defamatory statements made by respondent Gliedman, a Special Assistant to the Attorney General, at a press conference. The district court granted respondent's motion for summary judgment on the ground that the statements were related to the performance of respondent's official duties and, consequently, were absolutely privileged (App. 40-42). The court of appeals affirmed (Pet. App. A, pp. 13-18).

1. *The relevant facts.* Petitioner, formerly a District Director of Internal Revenue in Chicago, Illinois, was removed from his office in 1956 (App. 4, 8, 10). On February 27, 1957, he was indicted, together with

four other individuals, for conspiracy to defraud the United States of income taxes due and to commit perjury and for other offenses. *United States* v. *Sullivan*, No. 57, CR 149, District Court for the Northern District of Illinois, Eastern Division (Pet. 2). These indictments grew out of the criminal tax evasion case of *United States* v. *Shotwell-Manufacturing Co.*, 225 F. 2d 394 (C.A. 7), vacated and remanded, 355 U.S. 233.[2]

The United States Attorney for the Northern District of Illinois disqualified himself from the prosecution of the indictment in the *Sullivan* case (App. 9). The Attorney General then appointed respondent as a Special Assistant to the Attorney General, and placed him in charge of the prosecution of the indictment and of the investigation of the Internal Revenue Service in Chicago. Gliedman was given authority:

> * * * to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested; and in that connection you are specifically directed to file informations and to conduct in the Northern District of Illinois and in any other

[2] In 1956, the United States filed in the *Shotwell* case, then pending before this Court on a petition for a writ of certiorari, a motion to remand the cause to the district court. The motions and supporting affidavits charged that the defendants in *Shotwell* and petitioner Sauber had conspired to cause the dismissal of the *Shotwell* prosecution, by claiming falsely that the defendants in that case had made a voluntary disclosure of their tax derelictions before any investigation had been initiated by the Internal Revenue Service (see, 355 U.S. at 234-240).

> judicial district where the jurisdiction thereof lies, any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates which district attorneys are authorized by law to conduct. [Pet. App. C., p. 22.]

Gliedman was provided with a staff of three assistants and an administrative aide (App. 9).

Respondent took his oath of office on March 6, 1957 (Pet. App. C, p. 24). The following day he held a press conference (App. 5), in which he explained to the representatives of certain Chicago newspapers the reasons for his appointment as Special Assistant to the Attorney General, and the purpose and scope of his assignment (App. 5, 8-11). Certain statements allegedly made by respondent at this conference constitute the basis of this action.

2. *Proceedings below.* On March 14, 1957, petitioner commenced this suit by filing a complaint which alleged in substance that respondent "falsely and maliciously" had made the following "defamatory" statements to the press (App. 5-6):

> To conduct work preparatory to the Sauber trial to seek "possible further corruption."
>
> "When you have a man who was district director indicted for conspiracy to defraud the U.S. government of money, it doesn't take a genius to see something is wrong."
>
> "This is not a witch hunt, and it should be good for employee morale, because an awful cloud has been hanging over the Chicago office."
>
> "If nothing is there, we won't put it there."

Respondent moved for summary judgment on the ground that the statements attributable to him "had been made in the line of duty and consequently were absolutely privileged * * *" (Pet. 3). The motion was supported by an affidavit of Assistant Attorney General Warren Olney, III, which stated in part (App. 19):

> Howard B. Gliedman is in charge of the prosecution of the case of United States *vs.* Harold E. Sullivan, Byron A. Cain, Leon J. Busby, Ernest J. Sauber, and Ralph R. Johnson, as well as in charge of the investigation of alleged irregularities in the office of the Director of Internal Revenue, Chicago, Illinois.
>
> Howard B. Gliedman entered upon the above assignment on March 5, 1957, and he is performing this function in the capacity of Special Assistant to the Attorney General of the United States pursuant to authorization by the Attorney General of the United States.
>
> In his capacity as Special Assistant to the Attorney General of the United States, Howard B. Gliedman is authorized and expected to conduct relations with the press, and to make such public statements as are called for in connection with his assignment.

The affidavit was not controverted by petitioner when he filed his memorandum in opposition to respondent's motion for summary judgment[3] (see App. 23).

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[3] Subsequently, when respondent filed his own affidavit with his reply memorandum, petitioner moved to strike the affidavit, or, in the alternative, to have the application for judgment refused under Rule 56(f), F.R.Civ.P. Attached to

On September 24, 1957, the district court, holding that respondent's duties were in substance only those of a prosecuting attorney and not comparable to those of a cabinet member, denied respondent's motion for summary judgment on the authority of the decision of the Court of Appeals for the District of Columbia Circuit in *Barr* v. *Matteo*, 244 F. 2d 767 (App. 27-35).

On June 29, 1959, this Court reversed the decision of the court of appeals in the *Barr* case. 360 U.S. 564. Thereupon, respondent filed a renewed motion for summary judgment supported by the Olney affidavit (App. 38).[4] The district court granted the motion, holding that this Court's decision in the *Barr* case was controlling (App. 41-42); accordingly, the district court dismissed the complaint (App. 42).

The court of appeals affirmed, holding that "[m]easured by the criteria set forth in * * * [*Barr*

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the motion was an affidavit by one Johnston, an attorney associated with petitioner's counsel, which stated, without setting forth any basis for the assertion, that Gliedman was not authorized or expected to conduct relations with the press or to make public statements in connection with the duties assigned to him as a Special Assistant to the Attorney General (App. 23-26). The procedural status of these two later affidavits is not clear (see App. 34-35). However, the Johnston affidavit was entirely insufficient to controvert the facts of Gliedman's authority as set forth in the Olney affidavit. See *Preble* v. *Johnson*, 275 F. 2d 275, 279 (C.A. 10); 6 Moore, *Federal Practice* (2d ed.), par. 56.22, p. 2329. In any event, the affidavit was not submitted on Gliedman's second motion for summary judgment.

[4] The record does not disclose any affidavit filed by petitioner in opposition to this motion (see App. 38-40, 45).

v. *Matteo*, 360 U.S. 564], Gliedman's statements to the press call for the application of the doctrine of absolute privilege." The court went on to say that "[i]n respect to his legal assignment of prosecutor and investigator of Sauber and the Department of Internal Revenue in Chicago, Gliedman was the direct representative of the Attorney General of the United States. As such representative * * *, Gliedman held the responsibilities, duties, and discretion of the Attorney General of the United States, limited in scope only to the proceedings assigned to him." (Pet. App. A, p. 17). The court further pointed out that (Pet. App. A, pp. 17-18):

> His superior officer certified that Gliedman was authorized and expected to conduct relations with the press and to make such public statements as were called for in connection with his assignment. The statement to the press complained of here related to the subject matter of Gliedman's assignment. Irregularities in the performance of their duties by important public officials are of great public concern, and the public has a right to be informed as to the steps taken by the proper governmental agency to investigate and correct abuses of authority.
>
> Liability to respond in damages in an action based on defamatory statements to the press relating to matters within his power and discretion and of public interest and concern might seriously interfere with the performance of the duties of a Special Assistant to the Attorney General of the United States.

ARGUMENT

The principles laid down by this Court in *Barr* v. *Matteo*, 360 U.S. 564, are controlling in the present case. Since the case turns entirely upon the application of those principles to the particular facts and circumstances, no question of general importance is presented; moreover, the decision below is clearly correct. The petition for a writ of certiorari should therefore be denied.

In the *Barr* case and in *Howard* v. *Lyons*, 360 U.S. 593, decided the same day, this Court confirmed the rule that acts of public officials, including their statements to the press, which are related to matters committed to their control or supervision are absolutely privileged. In so doing, the Court reaffirmed its earlier ruling in *Spalding* v. *Vilas*, 161 U.S. 483, and *Yaselli* v. *Goff*, 12 F. 2d 396 (C.A. 2), affirmed, 275 U.S. 503 (absolute privilege to Special Assistant to Attorney General), and ratified the decisional law of the lower courts.[5]

Petitioner seeks review by this Court on the grounds that (1) the decision in *Barr* is limited in scope to persons in positions similar to that held by Barr, and (2) the action by the respondent was not related to matters committed by law to his control or supervision. Each assertion rests upon a fundamental misconception. In the first, petitioner

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[5] See *Barr* v. *Matteo*, 360 U.S. at 572 and fn. 9; 3 Davis, *Administrative Law Treatise*, Sec. 26.01 (Pocket part, 1960) ("the law before the Barr decision was overwhelmingly what the majority held it to be in the Barr case * * *").

wholly misconstrues the *Barr* holding, and in the second, he mistakenly limits the scope of respondent's authority and duties.

1. Petitioner plainly attempts to distort this Court's decision in *Barr* (Pet. 6, 7) as holding that the "outer perimeter of absolute privilege" is reached when an agency head of Barr's rank and policy-making status makes a public statement with respect to a matter where the integrity of the agency and the official has been directly and severely challenged in charges made in the Congress. But this Court did not use the words "outer perimeter" in any such context; rather, it said (360 U.S. at 575 (emphasis added)) that the fact that Barr's action "was within the *outer perimeter of* [*his*] *line of duty*" was enough to make the privilege applicable, "despite the allegations of malice in the complaint." The Court emphasized that (*id.* at 573-574):

> It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," *Spaulding* v. *Vilas*, *supra*, at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

The Court also pointed out (*id.* at 571) that the reason for the recognition of privilege is that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—

suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." As this Court recognized, it is not enough to grant absolute privilege only to officers of the cabinet. The sheer magnitude of government, and the attendant necessity for delegation and redelegation of governmental functions and duties, has made increasingly important the roles which numerous inferior officials fill in the administration of public matters and has put inferior officers in the position of exercising the discretion of their superiors in dealing with the general public on subjects related to "matters committed by law to [their] control or supervision" (*id.* at 573).

2. Measured by the criteria in the *Barr* opinion, the court of appeals was correct in holding that respondent's challenged action was absolutely privileged. The attendant circumstances and the range of respondent's responsibilities clearly indicate that the holding of the press conference was related to matters under the supervision and control of respondent. Petitioner, a District Director of Internal Revenue, had been indicted, and the Chicago Office of the Internal Revenue Service was under investigation. The public was therefore obviously interested in the operation of this important government agency. Clearly, any pertinent information given to the public on steps being taken by the Department of Justice in the matter would have served to further public confidence in proper

governmental administration. Since there is no question that the Attorney General would have been absolutely privileged had he discussed these matters with the press (*Barr* v. *Matteo*, *supra*, 360 U.S. at 574-575, 577-578; *Mellon* v. *Brewer*, 18 F. 2d 168, 171 (C.A. D.C.), certiorari denied, 275 U.S. 530; *Glass* v. *Ickes*, 117 F. 2d 273 (C.A. D.C.), certiorari denied, 311 U.S. 718), and since the authority of the Attorney General to hold a press conference was implicitly delegated to respondent, respondent was also absolutely privileged.

Petitioner persists in characterizing respondent as a mere "prosecutor" [6] but, clearly, the latter's duties were not thus restricted. He was appointed as a Special Assistant to the Attorney General and was charged not only with the prosecution of the indictment in which petitioner had been named, but also with the investigation of other possible offenses. In this connection, he was directed and empowered to file informations, and to conduct civil and criminal proceedings, including grand jury proceedings and proceedings before committing magistrates.[7] Within

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[6] Petitioner's apparent purpose is two-fold, (1) to attempt to rule out any representation by respondent of the Attorney General and, therefore, any exercise of the discretion attendant upon such representation; and (2) to bring Gliedman within the decision in *Jacobs* v. *Herlands*, 17 N.Y.S. 2d 711, affirmed, 19 N.Y.S. 2d 770, from which petitioner quotes at length in the petition (pp. 10-11). In no event can the *Jacobs* case be controlling here, however, since federal law is applicable. See *Howard* v. *Lyons*, 360 U.S. 593.

[7] In view of these powers and his position as Special Assistant to the Attorney General, respondent was entitled to immunity through absolute privilege, if only because of the

the ambit of these powers and duties, respondent was the representative of the Attorney General and held the responsibilities, duties, and discretion of the Attorney General. To hold otherwise would be an "unduly restricted view"[8] of respondent's assignment. Indeed, it may well be said that to fail to grant absolute privilege here would hamper the internal operation of the executive branch as surely as it would if such privilege were denied the Attorney General in a like situation.[9] In noting in the *Barr* case that in government today "there must of necessity be a delegation and redelegation of authority as to many functions" (360 U.S. at 573), the Court specifically referred to the Office of the Attorney General and to the fact that, in the early days of the Republic, the Attorney General personally performed all the functions of that office.

Furthermore, the record bears out respondent's authority. The affidavit of Assistant Attorney General Olney states not only that respondent was authorized, but that he was "expected", to conduct relations with the press (App. 19). It was not necessary that the Attorney General specifically direct, request or author-

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close relation of his duties to the judicial branch of the government. Cf. *Yaselli* v. *Goff*, *supra*; *Bradley* v. *Fisher*, 13 Wall. 335, 347.

[8] *Barr* v. *Matteo*, *supra*, 360 U.S. at 574-575.

[9] For purposes of this case, it is not necessary to interpret *Barr* as extending absolute privilege to an executive officer who was not in such a representative capacity, but by this we do not mean that *Barr* should not be so interpreted.

ize respondent, in his letter of authority, to hold a press conference in order to make it an "official action". See *United States* v. *Birdsall*, 233 U.S. 223, 230-31; *Cooper* v. *O'Connor*, 99 F. 2d 135, 139 (C.A. D.C.), certiorari denied, 305 U.S. 643. The uncontradicted affidavit of the Assistant Attorney General, while not conclusive on the courts, fully supports a judicial determination that respondent's statements to the public were "in the discharge of [his] * * * official duties and in relation to matters committed to him for determination." *Howard* v. *Lyons*, *supra*, 360 U.S. at 597-598. Respondent's action was therefore absolutely privileged, and the court of appeals was entirely correct in so holding.

3. *De novo* appraisal by this Court is neither necessary nor warranted. Since the decisions in *Yaselli* v. *Goff*, *supra*, and *Spalding* v. *Vilas*, *supra*, the courts of appeals and district courts have established a large body of case law to the effect that public officials, whether or not they hold cabinet rank, are immune from private tort suits based upon acts which, as those here involved, are found to be connected with their public duties. In such cases, it appears that petitions for writs of certiorari, if filed, have been uniformly denied.[10] Moreover, because of

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[10] See, *e.g.*, *Newbury* v. *Love*, 242 F. 2d 372 (C.A.D.C.), certiorari denied, 355 U.S. 889; *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4), certiorari denied, 341 U.S. 921; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949; *Laughlin* v. *Garnett*, 138 F. 2d 931 (C.A. D.C.), certiorari denied, 322 U.S. 738; *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A.D.C.), certiorari denied, 314 U.S. 665;

this Court's decisions in the *Barr* and *Howard* cases, there is even less justification for review in the present case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ALAN S. ROSENTHAL,
KATHRYN H. BALDWIN,
Attorneys.

APRIL 1961

Glass v. *Ickes*, 117 F. 2d 273 (C.A.D.C.), certiorari denied, 311 U.S. 718; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.), certiorari denied, 305 U.S. 643; *Lang* v. *Wood*, 92 F. 2d 211 (C.A.D.C.), certiorari denied, 302 U.S. 686; *Standard Nut Margarine Co.* v. *Mellon*, 72 F. 2d 557 (C.A.D.C.), certiorari denied, 293 U.S. 605; *Brown* v. *Rudolph*, 25 F. 2d 540 (C.A. D.C.), certiorari denied, 277 U.S. 605; *Mellon* v. *Brewer*, 18 F. 2d 168, certiorari denied, 275 U.S. 530.

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Supreme Court of the United States

No. 803

REPLY BRIEF FOR PETITIONER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 803.

ERNEST J. SAUBER,

Petitioner,

vs.

HOWARD B. GLIEDMAN,

Respondent.

REPLY BRIEF FOR PETITIONER.

Respondent asserts that he is immune from civil responsibility for defamation because he "was the representative of The Attorney General and held the responsibilities, duties and discretion of the Attorney General" (Opp. Br., pp. 11-13). This is supposed to follow because respondent was "charged" with the prosecution (Opp. Br., p. 11). Herein is the core of the answer to the instant petition.

Respondent was not in "charge" of anything. The Olney affidavit (App. 19) attempts to supply the omission of such authority. Respondent concedes that it is "not conclusive on the courts" (Opp. Br., p. 13). A special assistant is limited to the duties set forth in his letter of authority (Cases cited fn. 2, Pet. p. 7). Respondent was but "to assist in the trial" and "file . . . and conduct . . . proceedings . . . which district attorneys are authorized to conduct". (Letter of Authority, Pet.,

App. C., p. 22) and only this he swore to do (Oath of Office, Pet. App. C., p. 24).

A specially appointed Department of Justice trial attorney, appointed to *assist* a United States Attorney who has disqualified himself, does not have the "responsibilities, duties and discretion of the Attorney General" (Opp. Br., p. 12), much less absolute privilege for his utterances. Attorney General Rogers did not understand that *Barr* gave absolute privilege to departmental heads for their "press releases" (Memorandum, Pet. App. D., p. 25), much less to those of his special assistants with no permanent geographical status to render them responsible to the community and therefor circumspect in their public utterances.

Respondent assert, in effect, that there is absolute privilege for *every* utterance of a government attorney. The traditional role and duties of a prosecutor are not only ignored, they are stated to be irrelevant (Opp. Br., p. 12). Gliedman's commission directs him to conduct the government's business as a lawyer, nothing more. This he plainly did not do. He struck "foul", not "hard blows" (*Berger* v. *U. S.*, 295 U. S. 78, 88).

Nothing in any of the several opinions in *Barr* can be read in a context granting an absolute privilege to a federal prosecutor to defame an accused, whose individual rights and liberties he is sworn to observe and sustain. Contrariwise, our fundamental political philosophy and professional tradition alike negate such an alien doctrine.

We, again, respectfully submit that this petition should be granted.

Respectfully submitted,

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